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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES FIRE INSURANCE COMPANY,

Petitioner,

vs.

GENE L. and CATHY CAVANAUGH,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

UNITED STATES FIRE INSURANCE COMPANY,

Petitioner,

vs.

GENE L. and CATHY CAVANAUGH,

Respondents.

QUESTION PRESENTED

If an insurer agrees to insure a vessel in a limited geographic area and specifically so provides in the insurance policy, is the loss of the vessel which occurs about 400 miles outside the area nonetheless insured if the vessel was

taken beyond the insured area without the insured vessel owner's consent. */

PARTIES TO THE PROCEEDING

United States Fire Insurance Company (Appellant), Gene L. Cavanaugh and Cathy Cavanaugh (Appellees) were parties before the United States Court of Appeals for the Eleventh Circuit.

United States Fire Insurance Company issued insurance coverage for the shrimp trawler "Serious Business" through the Cavanaughs' insurance agent Bayly, Martin and Fay, but the firm of Bayly, Martin and Fay was not a party to the proceedings.

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*/ A subsidiary question of importance is whether breaches of policy terms can be overlooked when an act of barratry occurs despite a finding that barratry did not proximately cause the loss of the vessel.

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UNITED STATES FIRE INSURANCE COMPANY,
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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

OPINIONS BELOW

The Final Opinion of the United States Court of Appeals for the Eleventh Circuit appears in the Appendix to this Petition with the Dissenting Opinion of Justice James C. Hill. (App. pp. 1a-36a). 1/ Also appearing in the Appendix

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1/ Citations to the Petition's Appendix shall be by page number followed by an "a", i.e., "(App. p. 1a)".

are the Final Judgment and Findings of Fact and Conclusions of Law of the United States District Court for the Southern District of Florida. (App. pp. 37a-39a, 40a-63a).

The Final Opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 732 F.2d 832 (11th Cir. 1984), and the decision of the United States District Court for the Southern District of Florida is reported at 1983 AMC 1261 (S.D. Fla. 1982).

STATEMENT OF JURISDICTIONAL GROUNDS

This Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit arises from the Opinion filed by the Eleventh Circuit on May 17, 1984. (App. pp. 1a-36a). The Petition for Rehearing and Suggestion for Rehearing En Banc was denied on July 11,

1984. A copy of the Order denying the Petition for Rehearing and Suggestion for Rehearing En Banc is in the Appendix together with the Notification filed by the Clerk of the Eleventh Circuit. (App. pp. 64a-66a, 67a-68a).

Petitioner invokes the discretionary jurisdiction of this Honorable Court pursuant to the provisions of 28 U.S.C. § 1254(1). The decision of the Eleventh Circuit conflicts with established precedent of the Fifth Circuit in Wilburn Boat Co. v. Fireman's Fund Insurance Co., 201 F.2d 833 (5th Cir. 1953), rev'd on other grounds, 348 U.S. 310, 75 S.Ct. 368, 99 L.Ed. 337 (1954), and the Sixth Circuit in Home Insurance Co. v. Ciconett, 179 F.2d 892 (6th Cir. 1950). The great need for uniformity in maritime law of the United States is a proper reason for review of

the decision which is the subject of this Petition. 2/

STATEMENT OF THE CASE

This was a declaratory judgment action filed by United States Fire Insurance Company (hereinafter U.S. Fire or Petitioner), to determine whether the policy sued upon provided coverage for the loss or destruction of the shrimp trawler "Serious Business" which occurred when it ran aground and burned 160 miles southwest of Jamaica. The Defendants counterclaimed for damages under the terms of the policy claiming the loss was caused by the Captain's barratry. The Trial Court had jur-

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2/ Various other Circuits also hold that a breach of warranty releases the insurance company from liability. The following is a list of these cases: Shamrock Towing Co. v. American Insurance Co., 9 F.2d 57, 60 (2d Cir. 1925); Fidelity-Phenix Insurance Co. v. Chicago Title and Trust Co., 12 F.2d 573 (7th Cir. 1926); Whealton Packing Co. v. Aetna Insurance Co., 185 F. 108 (4th Cir. 1911).

isdiction pursuant to 28 U.S.C. § 1333. (App. p. 52a).

At the time of the loss, U.S. Fire had issued a marine insurance policy which, subject to certain restrictions, provided coverage for the "Serious Business" to Gene L. and Cathy Cavanaugh, (hereinafter Cavanaughs or Respondents). The Respondents owned and operated the boat since it was purchased from Gene's father, Lennis Cavanaugh. The existence of a $100,000.00 purchase money mortgage in favor of Atlas Underwriters, Ltd. (hereinafter Atlas) was disclosed to U.S. Fire, and Atlas's interest was separately insured by U.S. Fire. 3/ The existence of a second pur-

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3/ By an endorsement, separate insurance coverage for an additional premium and with very different terms was provided through U.S. Fire to the first mortgage holder, Atlas. This endorsement protected Atlas from the defenses to coverage that are the basis of Petitioner's denial of coverage.

chase money mortgage held by Lennis Cavanaugh in the amount of $120,000 was not disclosed until after the loss.

The events which led to this unfortunate loss began on May 13, 1981, when Gene Lee Cavanaugh entered into a charter agreement with William C. Ballard (hereinafter Ballard), under the terms of which Ballard would have exclusive use and control of the "Serious Business".

The "Serious Business" left the Florida Keys with Ballard aboard as Captain on or about May 15, 1981. One month

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FOOTNOTE 3 (Continued)

No such coverage was obtained for Lennis Cavanaugh's mortgage interest. Atlas was originally a Defendant in this action, but discovery revealed that it had no privity or knowledge of the events which gave rise to Petitioner's denial of coverage, and thus the first mortgage was satisfied by U.S. Fire under the terms of the separate endorsement.

later, in the early morning of June 14, 1981, the Coast Guard called Respondents and advised that the "Serious Business" was aground and breaking up on the Bajo Nuevo Reef approximately 160 miles southwest of Jamaica. The next day, June 15th, a United States Coast Guard helicopter located the remains of the "Serious Business" on the Bajo Nuevo Reef, an area not within the waters in which the insurance policy provided coverage. Due to the location of the boat, it took the United States Coast Guard one day to reach the "Serious Business". (T. Vol. 3 at 22). 4/ The insurance policy expressly provided:

> Warranted navigation confined to U.S. coastal and inland tributary waters from Cape Hatteras, North Carolina to Brownsville,

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4/ Citations to the transcript of the trial shall be volume and page number, i.e., "T. Vol. 3 at __."

> Texas, both inclusive, but not to exceed 150 miles offshore therefrom. 5/

It was stipulated by the parties that the Bajo Nuevo Reef is approximately 160 miles southwest of Jamaica and approximately 400 miles beyond the warranted navigation limit. 6/

The Respondents testified they did not authorize the Captain to navigate the vessel beyond the geographic territory specified in the insurance policy. The reason why the vessel ran aground outside the navigational limit is unknown. No testimony was presented from Captain Ballard or the crew.

5/ A copy of the endorsement to the policy which contains the warranty confining navigation is in the Appendix. (App. p. 69a).

6/ In paragraphs 17 and 20 of the Pretrial Stipulation the parties admit that the Bajo Nuevo Reef is 400 beyond the navigational limit. The Pretrial Stipulation is found in Volume 1, page 115 of the record.

Despite a complete absence of evidence concerning how or why the "Serious Business" was destroyed on the Bajo Nuevo Reef, the Trial Court held: that the vessel being beyond the navigational limit constituted barratry of the Captain; that barratry caused the loss; and since barratry was a covered peril the Respondents had a right to recover from the Petitioner. (App. pp. 54a, 55a).

The United States Court of Appeals for the Eleventh Circuit disagreed with the first part of the Trial Court's finding, and held that the proximate cause of the loss of the boat was not barratry but grounding and burning on the Bajo Nuevo Reef. United States Fire Insurance Co., supra, 732 F.2d at 835, 840 (App. p. 9a). The Court, however, went on to hold that loss by grounding and fire was specifically covered under the insurance policy

because barratry could not operate to void coverage. Id. at 835. (App. pp. 9a-10a). The Eleventh Circuit affirmed the decision of the District Court holding Petitioner liable under the terms of the policy. Judge Hill points out in his dissent that grounding and fire were not "covered" perils because the grounding and fire occurred beyond the navigational limit, in an area for which there was no coverage despite the majority's finding of barratry. Id. at 841. (App. p. 13a).

REASONS FOR GRANTING WRIT

The decision of the Eleventh Circuit conflicts with clear precedent of the Fifth Circuit established in Wilburn Boat Co., supra, 201 F.2d at 833, and clear precedent of the Sixth Circuit established in Home Insurance Co., supra, 179 F.2d at 892, where the Courts clearly held that a

breach of express terms in a marine insurance policy prevents recovery even though the loss would otherwise be covered.

The United States Supreme Court in Kossich v. United Fruit Co., 365 U.S. 731, 81 S.Ct. 886, 6 L.Ed. 756 (1961), decided, among other things, that a marine insurance policy is a maritime contract and subject to the admiralty jurisdiction of Federal Courts. Conflicts among Circuits in admiralty should be avoided. See, Kossich, supra, 365 U.S. at 742, 743, 81 S.Ct. at 894. Insurers issuing policies for vessels should not be subject to different results for the same occurrence depending on which Circuit the action is brought in. The "Serious Business" was permitted to navigate from Brownsville, Texas to Cape Hateras, North Carolina. The action was brought in Florida, but the result should be no different than if it

would have been brought in Texas. If the Eleventh Circuit's decision is affirmed the result will be different.

The Trial Court held that this loss was covered because it was proximately caused by barratry. (App. pp. 54a-55a). The Trial Court's finding that barratry proximately caused the loss is without support in the record, and the Eleventh Circuit correctly held that the proximate cause of the loss of the "Serious Business" was grounding and fire approximately 400 miles beyond the area in which the policy provided coverage. 7/ However despite this, the majority of the Eleventh Circuit affirmed the Trial Court's decision.

7/ Algood, District Judge, sitting by designation stated, "The proximate cause of the loss of the SERIOUS BUSINESS was the grounding and burning on the Bajo Nuevo Reef." 732 F.2d at 835. (App. p. 9a).

The issue before the Court is whether the loss of the "Serious Business", proximately caused by grounding and fire, is covered under the terms of an insurance policy confining navigation to an area that is 400 miles from where the grounding and fire occurred.

It is respectfully submitted that the Eleventh Circuit's affirmance is based on an erroneous view of the law and is in direct contravention of clearly established precedent concerning the effect of breaches of warranties on insurance coverage. E.g., Wilburn Boat Co. v. Fireman's Fund Insurance Co., 201 F.2d at 836; see also, Robinson v. Home Insurance Co., 73 F.2d 3 (5th Cir. 1934) (insured could not recover for fire loss occurring at a place other than location specifically warranted in policy). It has long been established in general maritime law that contracts of

insurance must be enforced as written. Id. at 836. And it is equally settled under general maritime law that a warranty in a contract of insurance must be complied with and followed literally. Id. 8/

The navigational warranty is an express stipulation in the insurance contract whereby U.S. Fire consented to be liable in the event of loss or destruction of the boat provided it stayed within a certain geographical area. The area in which the boat is to be operated is very important to the insurer in deciding whether to accept the risk and in determining the amount of premium to be charged. (T. Vol. 3 at 173-175; T. Vol. 4 at 289-290).

8/ Florida law does not change general maritime law as stated in Wilburn Boat Co. To the contrary, "Florida draws heavily on maritime law . . . ." Gulfstream Cargo, Ltd. v. Reliance Insurance Co., 409 F.2d 974 (5th Cir. 1969).

Courts throughout the United States realize the significance of warranties and the significance of expressed exclusions from coverage. Since 1953 the clear precedent established by the Fifth Circuit in Wilburn Boat Co. and by the Sixth Circuit in Home Insurance Co. has been consistently followed. See, Nautilus Virgin Charters, Inc., 510 F. Supp. 1092, 1097 (D. Md. 1981); Republic of China, supra, 151 F. Supp. at 231; and R & W Boat Rentals, Inc. v. Pennsylvania Insurance Co., 257 So. 2d 448, 449 (La. App. 1972).

The Trial Court and Eleventh Circuit are under the mistaken belief that breaches of warranties can be overlooked when an act of barratry has occurred. 9/

9/ U.S. Fire does not accept the majority's characterization of Ballard's actions as barratry. However, for the sake of argument, U.S. Fire shall accept the majority's characterization of Ballard's actions as barratry.

Neither Court cited cases to support their holding that "barratry cannot operate to breach the warranty". See, United States Fire Insurance Co., supra, 732 F.2d at 835. (App. p. 10). The fact that no case is cited for support of the proposition is not an oversight. There are no cases which support such a holding. To the contrary, the rule of law stated in Republic of China, supra, and which is consistently followed is that where barratry:

> . . . is one of the causes of the loss, if the ultimate cause (such as stranding or capture) is not excluded from coverage by a warranty or an exclusion clause, recovery may be had whether or not the ultimate cause of the loss was or was not a peril insured against . . . . But where the ultimate cause of the loss is excluded from coverage by a warranty or an exclusion clause, recovery may not be had on the grounds of barratry.

151 F. Supp. at 231 (citations omitted) (emphasis added).

It naturally follows that if the loss of the "Serious Business" was proximately caused by its grounding and fire on the Bajo Nuevo Reef, such loss is not covered because navigation in that area was warranted against.

It is clear that for the Cavanaughs to recover barratry must have been the efficient cause of the loss. Republic of China, 151 F. Supp. at 231. In this instance it was not.

The Eleventh Circuit held that grounding and fire caused the loss, but ignored that the perils of grounding and fire were excluded from coverage by the breach of the navigational warranty. See, Republic of China, 151 F. Supp. at 231. 10/

10/ Algood, District Judge, in the majority opinion states: "The proximate cause of the loss of the SERIOUS BUSINESS was the grounding and burning on the Bajo Nuevo Reef." 732 F.2d at 835. (App.

The findings of the District Court and the majority decision of the Eleventh Circuit were induced by an erroneous view of established law and clear precedent that a breach of warranty precludes recovery, Wilburn Boat Co., supra, 201 F.2d at 836, and that recovery for barratry may not be had where the ultimate cause of the loss is excluded from coverage by a warranty. Republic of China, supra, 151 F. Supp. at 231.

There are numerous cases in which barratry has been followed by seizure of a vessel by a foreign power. See e.g., John Corey & Sons v. Burr, (1883) A.C. 393; Ope

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FOOTNOTE 10 (Continued)

p. 9a). Judge Hill, Circuit Judge, in his dissent also states: "In this case, it is clear beyond doubt that the efficient clause of the ship's loss was grounding on the Bajo Nuevo Reef. 732 F.2d at 839. (App. p. 30a).

Shipping Ltd. v. Allstate Insurance Co., 521 F. Supp. 342 (S.D.N.Y. 1981); aff'd in part, rev'd in part, 687 F.2d 639 (2d Cir. 1982), cert. denied, ____ U.S. ____, 103 S.Ct. 1523, 75 L.Ed.2d 946 (1983); Flota Merchante Dominicana v. American Manufacturers Mutual Insurance Co., 312 F. Supp. 58 (S.D.N.Y. 1970). In these cases the free of capture and seizure (f.c. & s.) warranty prevented recovery for the loss. see also Nautilus Virgin Charters, 510 F. Supp. at 1094, 1100 n.4. 11/

The Trial Court said that the cases referred to above were distinguishable because they involve exclusions created by

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11/ Nautilus Virgin Charters involved a loss preceded by navigation beyond the territorial limit barratrous conduct of the master and seizure. Coverage for loss was denied because the f.c. & s. warranty was breached when the boat was seized.

detention or seizure of the vessels, but such distinction has no merit. There is no distinction to be made between a loss not covered by breach of the free of capture and seizure warranty and a loss not covered by breach of a territorial warranty. United States Fire Insurance Co., supra, 732 F.2d at 839. (App. p. 28a).

And, certainly what cannot be overlooked is that all the above cited cases dealt with barratry followed by circumstances expressly warranted against, and in every instance the courts held that despite the finding of barratry the losses were excluded from coverage due to breach of warranty. John Corey & Sons, supra; Ope Shipping, Ltd., supra; Flota Merchante Dominicana, supra; and Nautilus Virgin Charters, supra.

The analysis here must be identical to the courts' analysis in the free of

capture and seizure cases. The boats in Nautilus Virgin Charters and John Corey & Sons may or may not have been seized had the barratry not occurred, but nevertheless it is clear that barratry did not proximately cause the loss in either case. When the "Serious Business" went outside the navigational limits, no one knows what occurred. But, even if the act of navigating outside the navigational limit is considered barratry, it certainly did not cause the loss of the "Serious Business". 12/ The grounding occurred 400 miles later.

If "barratrous" conduct is permitted to extend coverage, the result is to subject insurance companies to perils not contemplated by them in issuing policies

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12/ There is no authority for holding that navigating outside the policy limits is barratry.

and to contravene the long established precedent set in Republic of China, supra, 151 F. Supp. at 231.

Judge Hill wisely reminds us that "we are dealing . . . not with a tort but with a contract." 732 F.2d at 841. (App. p. 34a). It is crystal clear that the proximate cause of the loss of the "Serious Business" was grounding and fire 400 miles beyond the navigational limit warranted in the policy. "Under general maritime law, contracts of insurance must be enforced as written and . . . a warranty in a contract of insurance must be literally complied with . . . ." Wilburn Boat Co., supra, 201 F.2d at 836.

U.S. Fire complied with all contractual obligations owed the Cavanaughs. The declaratory action was promptly filed after an investigation was conducted. Upon completion of the investigation, U.S.

Fire determined it was unquestionably clear that the loss of the "Serious Business" occurred as a result of grounding and a subsequent fire 400 miles beyond the warranted navigational limits. U.S. Fire satisfied the first mortgage held by Atlas under the terms of the separate insurance endorsement, and denied coverage to the Cavanaughs because the loss occurred outside the geographic area in accordance with clearly established precedent. 13/

Insurers owe all of their assureds the duty to pay only those claims for which there is coverage. U.S. Fire fulfilled its obligations by paying Atlas $73,824.31 (App. p. 59a) and denying coverage to the Cavanaughs.

13/ E.g. Wilburn Boat Co., supra, and Home Insurance Co., supra; see also footnote 2 supra.

A careful reading of the main policy issued for the benefit of the Cavanaughs and the terms of the separate endorsement issued for the benefit of Atlas clearly reveals that U.S. Fire agreed to insure different risks and clearly reveals the underlying reason why the Cavanaughs were not insured for loss or destruction occurring beyond the specified geographic area. The mortgagee endorsement purchased for the benefit of Atlas is commonly referred to as breach of warranty coverage because it provides coverage despite or in the event of breaches of warranty. The same is not true of the main policy. The Cavanaughs expressly limited their coverage to a geographic area and the premium paid reflects the restriction. (T. Vol. 3 at 173-175; T. Vol. 4 at 289-290). U.S. Fire specifically agreed to be liable to

Atlas in the event of loss or destruction occurring beyond the warranted navigational limit.

CONCLUSION

This Petition for Writ of Certiorari should be granted. The Cavanaughs agreed in the contract of insurance to confine the navigation of the vessel, but they did not.

Even if one assumes, for the sake of argument only, that Captain Ballard committed barratry, [14] recovery may not be had on the grounds of barratry because the ultimate cause of the loss is excluded from coverage. Republic of China v. National Union Fire Insurance Co., 151 F. Supp. 211, 231 (D. Md. 1957); see also

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14/ U.S. Fire does not believe the record supports this conclusion.

Nautilus Virgin Charters v. Edinburgh Insurance Co., 510 F. Supp. 1092, 1097 (D. Md. 1981).

U.S. Fire did not consent to be liable to the Cavanaughs in the event of loss or destruction occurring at a place other than one within the area specified in the insurance policy. Since the Eleventh Circuit held that the proximate cause of the loss was grounding and fire 400 miles beyond the warranted navigational limit, the quest for uniformity in admiralty requires granting this Petition and a holding that there is no coverage.

For the reasons set forth above, Petitioner urges that this Petition for a Writ of Certiorari must be granted.

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DATED: September 28, 1984

CERTIFICATE OF SERVICE

I, CHRISTIAN D. KEEDY, being over the age of 18 years, hereby certify that I have this 28th day of September, 1984, served three copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit and to John D. Kallen, Esquire, Hayden & Milliken, P.A., Counsel for Respondents, 5915 Ponce de Leon Boulevard, Suite 63, Coral Gables, Florida 33146, by mailing said copies in sealed envelopes, first class, postage prepaid, deposited at the United States Post Office located at One Biscayne Tower, Two South Biscayne Boulevard, Miami, Florida.

By: /s/
CHRISTIAN D. KEEDY

APPENDIX

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UNITED STATES FIRE INS CO. V. CAVANAUGH

UNITED STATES FIRE INSURANCE COMPANY,
Plaintiff-Counter Defendant-Appellant,

v.

GENE L. CAVANAUGH, CATHY CAVANAUGH
and ATLAS UNDERWRITERS,

Defendants-Counter Plaintiffs-Appellees.

No. 82-6064

United States Court of Appeals,
Eleventh Circuit.

May 17, 1984

Appeal from the United States District Court for the Southern District of Florida.

Before HILL and HATCHETT, Circuit Judges, and ALLGOOD*, District Judge.

ALLGOOD, District Judge:

United States Fire Insurance Company (U.S. Fire) brought this action for de-

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*/ Honorable Clarence W. Allgood, U.S. District Judge from the Northern District of Alabama, sitting by designation.

claratory judgment against Gene and Cathy Cavanaugh, seeking a judgment that it was not liable for the damage suffered by the Cavanaughs' shrimp trawler, the "Serious Business." The Cavanaughs counterclaimed to recover for the loss. The district court entered judgment for the Cavanaughs and U.S. Fire appealed.

Gene and Cathy Cavanaugh were the owners of the "Serious Business" at the time it ran aground and burned on June 15, 1981. The Cavanaughs had purchased the trawler from Gene's father, Lennis, in August, 1980. During the time Lennis Cavanaugh owned the trawler and at all times until its final voyage, Gene Cavanaugh had been the captain. In May 1981, Gene Cavanaugh was recovering from chicken pox and entered into a charter agreement with William C. Ballard to take the "Serious Business" shrimping. Ballard

was to operate the trawler between St. Augustine, Florida, and Brownsville, Texas, and was informed of a 150 mile navigational limit warranted in the insurance policy which covered the "Serious Business." Cavanaugh apparently hired Ballard primarily on his reputation, but did take him on a "shakedown" cruise prior to the trawler's departure on May 15, 1981. Ballard was to contact Cavanaugh if he had any problems or when he put in at port. When the trawler left Stock Island, Florida, on May 15, Ballard and two of Cavanaugh's experienced crew members were the only people on board.

On June 14, 1981, the Coast Guard notified the Cavanaughs that the "Serious Business" was aground and burning on the Bajo Neuvo Reef about 150 miles southwest of Jamaica. The next day, eight people were rescued from the water near the re-

mains of the trawler. Ballard has not been seen nor heard from again.

The "Serious Business" was insured by U.S. Fire at the time it was purchased from Lennis Cavanaugh and that policy was renewed by Gene and Cathy Cavanaugh. The policy provided coverage for the "barratry of the masters and mariners and all other like perils . . . ." However, the trawler was covered only when it was being operated between Cape Hatteras, North Carolina, and Brownsville, Texas, and no further than 150 miles offshore. The Bajo Neuvo Reef is approximately 400 miles beyond the covered area.

U.S. Fire was advised of the loss, but denied coverage because the loss occurred outside the navigational limits of the policy and because of alleged mis-

representations by Cavanaugh. 1/ The company cancelled the policy and attempted to return the prepaid premium.

In October, 1981, U.S. Fire instituted this action for declaratory judgment on the insurance contract. The Cavanaughs counterclaimed, contending the loss was due to the barratry of Ballard and thus a covered loss. The district court found that the hiring of Ballard for the one fishing expedition did not constitute a change of management in violation of the insurance policy and that Cavanaugh had exercised due diligence to properly man

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1/ U.S. Fire contends that Gene Cavanaugh was in the process of negotiating the charter agreement with Ballard at the time he renewed the insurance, but represented that he was the captain and agreed to notify the insurer in the event of a change of management, which he failed to do. They also contend that the insured failed to exercise due diligence to properly man the vessel since he knew nothing about Ballard and did not verify his ability to operate the vessel in open waters.

the vessel. The court went on to find that there was no evidence that the Cavanaughs authorized, agreed to, or were in any way involved in Ballard's decision to operate the trawler beyond the 150 mile limit and concluded that that act amounted to barratry and was the proximate cause of the loss. Final judgment was entered in favor of the defendant, including prejudgment interest at the rate of 12% per year from the date of the loss.

On appeal, U.S. Fire contends that the district court erred: in finding that the policy was in force at the time of the loss; in determining that barratry was the proximate cause of the loss the "Serious Business"; and in awarding prejudgment interest.

There is no dispute that the "Serious Business" was beyond the 150 mile limit when she ran aground and burned. U.S.

Fire points to several cases which state that insurance coverage is suspended when a vessel goes beyond the navigational limits and that a loss during that time is not covered. Robinson v. Home Insurance Co., 73 F.2d 3 (5th Cir. 1931); Canton Insurance Office v. Independent Transp. Co., 217 F. 213 (9th Cir. 1914); R & W Boat Rentals, Inc. v. Pennsylvania Insurance Co., 257 So. 2d 448 (1st La. App. 1972). These cases are distinguishable from the present case on one crucial point: in all of the cited cases the various warranties were breached by a voluntary act of the insured. Such is not the case here. Had the Cavanaughs taken the trawler beyond the 150 mile limit or if it had been taken by another with the owner's knowledge or consent even if accidentally, then there would have been a breach of warranty and there would have

been no insurance coverage. The "Serious Business", however, was taken some 400 miles beyond the warranted limits by the unauthorized act of a third party in violation of both written and verbal agreements, an act against which the Cavanaughs were insured. What would have been a breach of warranty is not a breach in this case where the 150 mile limit was exceeded due to the barratrous acts of Ballard.

[1] In finding that the actions of Ballard constituted barratry, this court adopts the district court's definition of barratry which follows the guidelines set forth by our circuit. Barratry can be defined as (1) an act committed by the master or mariners of a ship involving a deliberate and willful disobeyance of the owner's instructions, (2) an act committed by the master or mariners of a ship for some unlawful, dishonest, or fraudulent

purpose, contrary to their duty to the owners, whereby the latter sustained an injury, or (3) every violation of duty by the master or mariners arising from gross and culpable negligence contrary to their duty to the owner. See Darien Bank v. Travelers Indemnity Co., 654 F.2d 1015, 1019 (5th Cir. 1981); Fishing Fleet, Inc. v. Trident Insurance Co., 598 F.2d 925, 927 (5th Cir. 1979).

Because this circuit has held that barratry covers gross and culpable negligence by the master or mariners, it is clear that the definition of barratry must also include deliberate and willful disobeyance by the master or mariners of an owner's oral or written instructions.

[2-5] The proximate cause of the loss of the "Serious Business" was the grounding and burning on Bajo Neuvo Reef. In admiralty cases the "cause which is

truly proximate is that which is proximate in efficiency." Lanasa Fruit Steamship & Indemnity Co. v. Universal Insurance Co., 302 U.S. 556, 563, 58 S.Ct. 371, 374, 82 L.Ed. 422 (1937). Loss by grounding or fire was specifically covered under the insurance policy. Since barratry, grounding and fire were all covered perils and the act of barratry cannot operate to breach the warranty and void coverage, the decision of the district court that U.S. Fire is liable under the policy for the loss must be affirmed. To hold otherwise would be to find that one covered peril could operate to relieve the insurer of any loss which occurred from another covered peril. 2/ On the issues of mis-

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2/ The district judge followed reasoning similar to that used by the court in Republic of China v. National Union Fire Insurance Co., 151 F. Supp. 211 (D. Md. 1957), aff'd, 254 F.2d 177 (4th Cir.

representation by the owners and failure to exercise due diligence to properly man the vessel, the evidence clearly supports the trial court's findings. The award of prejudgment interest is the rule in admiralty cases rather than the exception

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FOOTNOTE 2 CONTINUED

1958), cert. denied, 358 U.S. 823, 79 S.Ct. 38, 3 L.Ed. 64 (1958):

> [W]here barratry is one of the causes of the loss, if the ultimate cause (such as stranding or capture) is not excluded from coverage by a warranty or an exclusion clause, recovery may be had on the grounds of barratry, whether or not the ultimate cause of the loss was or was not a peril insured against . . . but where the ultimate cause of the loss is excluded from coverage by a warranty or an exclusion clause, recovery may not be had on the grounds of barratry.

Id. at 231.

Although the fact situation in this case does not lend itself to a similar finding here, the principle of granting recovery where barratry is connected to the ultimate cause of the loss (here, fire) is the same.

and this court finds no error on the part of the district court in so ordering.

AFFIRMED.

JAMES C. HILL, Circuit Judge, dissenting:

I dissent because the majority has misconstrued the role of barratry in this drama. The majority's result can be predicated only upon a conclusion that the captain's barratry extended the insurance coverage. As I see it, the result of the barratry was the owner's loss of coverage. It was a grievous loss to the owner, but not one of the losses against which the policy provided coverage. The insurance policy did not provide coverage against the loss of its own coverage; it insured against loss of the vessel. In maritime matters, the insured may recover only if a peril covered under the policy proximately causes the loss of the vessel. In this

case, the vessel was not lost as a proximate result of Ballard's barratry; [1] grounding proximately caused the loss of the vessel. The policy specifically does not cover losses caused by groundings (or other perils) occurring more than 150 miles offshore; therefore, the judgment of the district court should be reversed.

In holding that Ballard's barratry caused the loss of the vessel, the district court made the following findings of fact and conclusions of law:

> Captain Ballard's barratry was the proximate cause of the loss of the vessel. See Darien Bank, supra, 654 F.2d at 1019-22; Fishing Fleet, Inc., supra, 598 F.2d at 927-28. His deliberate and willful misconduct directly caused the grounding,

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1/ I accept the majority's characterization of Ballard's actions as barratry for purposes of this dissent; however, because of my resolution of the case, I see no need to pass on that issue and therefore, express no opinion as to the propriety of the majority's conclusion.

fire and destruction of the vessel. The cases cited by the Plaintiff/Counterdefendant for a contrary proposition are inapposite. Those cases, Blaine Richards & Co. v. Marine Indemnity Insurance Company of America, 635 F.2d 1051 (2d Cir. 1980) and Nautilus Virgin Charter, Inc. v. Edinburgh Insurance Co., 510 F. Supp. 1092 (D. Md. 1981), aff'd without published opinion, 673 F.2d 1314 (4th Cir. 1981), involved detention or seizure of vessels, where the insurance policy specifically excluded such detention or seizure from coverage under the Free from Capture and Seizure ("F.C.& S.") Clause. The case sub judice involves no detention or seizure of the vessel such that a specific exclusion from coverage applies. The vessel was outside the territorial limits of the policy as a result of the barratry of the master, which is covered loss under the "Perils" clause of the policy. Moreover, the Court notes that the following language from the Blaine & Richards Co., case:

> At the same time, the single cause nearest to the loss in time should not necessarily be found to be the proximate cause. [Citation omitted.] Instead, in accord with the reasonable understandings and

> expectations of the parties, we must attempt to ascertain what the Supreme Court has referred to as the "predominant and determining" or the "real efficient" cause of the loss [Citations omitted.] Determination of proximate cause in these cases is thus a matter of applying common sense and reasonable judgment as to the source of the losses alleged.

635 F.2d at 1054-55.

Thus, the district judge concluded that barratry, and not running aground on the reef, legally caused the loss. The opinion of the majority apparently concludes that, although grounding caused the loss, the barratry extended the coverage beyond the warranted limit. Both the district court and the majority are, I believe, in error.

Before I analyze the cases cited by the district judge and by the parties, it

will be helpful precisely to determine and define the issue presented. 2/ The policy covers specified perils including barratry and grounding. The policy does not, however, provide coverage for the specified perils if the territorial warranty (150 miles offshore) is breached. 3/ Despite the majority's opinion, the grounding cannot be covered because it clearly occurred outside the policy's 150-mile limit. Under the clear precedent in this circuit a breach of warranty precludes

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2/ As Chief Justice Bleckley of the Georgia Supreme Court noted, "when the right point of view is discovered, the problem is more than half solved." Ellison v. Georgia Railroad Co., 87 Ga. 691, 706-07, 13 S.E. 809 (1891).

3/ The policy provides, in pertinent part, "warranted navigation confined to U.S. coastal and inland tributary waters from Cape Hatteras, N.C. to Brownsville, Texas, both inclusive but not to exceed 150 miles offshore therefrom.

recovery even though a "covered" peril otherwise caused the loss. Wilburn Boat Co. v. Fireman's Fund Insurance Co., 302 F.2d 833 (5th Cir. 1953), rev'd on other grounds, 348 U.S. 310, 75 S.Ct. 368, 99 L.Ed. 337 (1954). In Wilburn, the policy contained a warranty that this vessel would only be used as a pleasure craft. The insured party breached this warranty; and even though the vessel was destroyed by fire (a covered peril), the court held that the breach of warranty precluded recovery. Id. at 836. This holding follows the often-stated rule that warranties in contracts of marine insurance must be literally and strictly enforced. See id. see also Arnould's Law of Marine Insurance

and Average ¶¶ 682, 683, 692 (16th ed. 1981). 4/

Both the Fifth Circuit's decision in Wilburn and this case involve a loss caused by a covered peril (grounding or fire). In Wilburn, the court held that the breach of the pleasure-craft warranty

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4/ The Supreme Court's reversal of the Fifth Circuit's decision in Wilburn does not render Wilburn invalid as applied to the present case. See 348 U.S. 310, 75 S.Ct. 368, 99 L.Ed. 337 (1954). In Wilburn, the insured contended that a Texas statute invalidated the general maritime law on enforcement of warranties. The statute required a breach of warranty to be causally connected to the loss before it would bar recovery. The Fifth Circuit held the Texas statute to be inapplicable, 201 F.2d at 836-37; however, the Supreme Court held that the statute would apply absent preemptive federal statutory or judge-made law, 348 U.S. at 321, 75 S.Ct. at 374. The Wilburn holding (of the Supreme Court) has been limited somewhat by the Court, see Kossick v. United Fruit Co., 365 U.S. 731, 81 S.Ct. 886, 6 L.Ed. 2d 56 (1961); and, in this case, neither party has indicated that Florida law would somehow change the result under general maritime law. We may thus assume that "Florida would draw heavily on maritime law in fashioning its own principles," Gulfstream Cargo, Ltd. v. Reliance Insurance Co., 409 F.2d 974 (5th Cir. 1969), and accept Wilburn as binding.

precluded recovery; the same logic should apply in this case to preclude recovery under the grounding clause because of the warranty that the vessel would remain within 150 miles of the shore. Of course, the "cause" of the breach of the warranty in this case was arguably a peril insured against (barratry). Nevertheless, the ultimate cause of the loss was excluded by the warranty; and numerous cases hold that although barratry might be the remote cause, no recovery is possible when the direct cause of the loss was excluded by warranty. See e.g., Republic of China v. National Union Fire Insurance Co., 151 F. Supp 211 (D. Md. 1957), aff'd, 254 F.2d 177 (4th Cir.), cert. denied, 358 U.S. 823, 79 S.Ct. 38, 3 L.Ed.2d 64 (1958); Nautilus Virgin Charters v. Edinburgh Insurance Co., 510 F. Supp. 1092 (D.Md. 1981), aff'd mem., 673 F.2d 1314 (4th Cir.

1981), cert. denied, 456 U.S. 945, 102 S.Ct. 2012, 72 L.Ed.2d 468 (1982); John Cory & Sons v. Burr, [1883] A.C. 393.

These cases rest on the doctrine of causa proxima non remota spectatur, 5/ which governs proximate cause in admiralty insurance cases; cases dealing with proximate cause in the negligence context are for the most part irrelevant. Blaine Richards & Co. v. Marine Indemnity Insurance Co., 635 F.2d 1051, 1054 (2d Cir. 1980).

As the district court noted, the Blaine Richards court stated that the "single cause nearest to the loss in time should not necessarily be found to be the proximate cause," citing Lanasa Fruit

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5/ The immediate not the remote cause is considered.

Steamship & Indemnity Co. v. Universal Insurance Co., 302 U.S. 556, 563, 58 S.Ct. 371, 374, 82 L.Ed. 422 (1937). As both the Lanasa court and the Blaine Richards court stated, however, the point is not that any remote cause is sufficient, but that the "cause which is truly proximate is that which is proximate in efficiency." Lanasa, 302 U.S. at 563, 58 S.Ct. at 374; Blaine Richards, 635 F.2d at 1054, see also Standard Oil Co. v. United States, 340 U.S. 54, 58, 71 S.Ct. 135, 137, 95 L.Ed. 68 (1950). 6/

6/ The Lanasa Court quoted the following statement by Lord Shaw, which aptly explains the notion of proximate cause.

> To treat proxima causa as the cause which is nearest in time is out of the question. Causes are spoken of as if they were as distinct from one another as beads in a row or links in a chain, but--if this metaphysical topic has to be referred to--it is not wholly so. The chain of causation is a handy

Simply stating the doctrine of causa proxima non remota spectatur does not,

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FOOTNOTE 6 CONTINUED

> expression, but the figure is inadequate. Causation is not a chain, but a net. At each point influences, forces, events, precedent and simultaneous, meet; and the radiation from each point extends infinitely. At the point where these various influences meet it is for the judgment as upon a matter of fact to declare which of the causes thus joined at the point of effect was the proximate and which was the remote cause.
>
> What does 'proximate' here mean? To treat proximate cause as if it was the cause which is proximate in time is, as I have said, out of the question. The cause which is truly proximate is that which is proximate in efficiency. That efficiency may have been preserved although other caused may meantime have sprung up which have not destroyed it, or truly impaired it, and it may culminate in a result of which it still remains the real efficient cause to which the event can be ascribed.

Leyland Shipping Co. v. Norwich Union Fire Insurance Society, [1918] A.C. 350, 369 (House of Lords).

however, quickly allow resolution of the issue presented in this case. There is authority, although its weight, effect, and validity may be questioned, that the efficient cause doctrine does not apply in cases of barratry, but that more remote causes may be considered. See generally Arnould's Law of Marine Insurance & Average ¶ 765 (16th ed. 1981). Although Arnould's treatise states that the barratry exception is well-established," its existence has been questioned by the House of Lords, see John Cory & Sons v. Burr, [1883] A.C. 393, 398 (Blackburn, L.J.), 7/

7/ Lord Blackburn stated:

> A passage was cited from the last edition of Arnould on Insurance, which I now find was in the first edition by Sir Joseph Arnould, it is in vol. ii., p. 838 of the first edition. He has there laid down that whilst it is very true that the general rule is that in insurance you look to the proximate

and, as the treatise states, the exception may be "explained" by other factors, thus rendering its applicability unclear. Arnould's ¶ 765. That somewhat ancient dispute need not be resolved here, how-

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FOOTNOTE 7 CONTINUED

> cause and not the remote one, there is an exception in the case of barratry and that the remote cause may be looked to there. I can only say that I think there is no other authority for such rule; and though certainly Mr. Justice Field the Lord Justice Brett seemed to suppose naturally on the authority of that statement in the textbook, that this was a rule of insurance law, I am at present advised to not think that it is. The very instances which are given in the passage from Arnould are instances in which the Court thought rightly or wrongly (I think rightly) that the cause of loss was barratry, and that the consequence for which the parties were entitled to be indemnified was not a remote consequence. That is all I say upon that part of the subject. I am merely putting in a protest against what may be hereafter cited as being an established principle of insurance law. For my own part I do not think that it is.

ever, because, as the court stated in Republic of China v. National Union Fire Insurance Co., 151 F. Supp. 211 (D.Md. 1957), aff'd, 254 F.2d 177 (4th Cir.), cert. denied, 358 U.S. 823, 79 S.Ct. 38, 3 L.Ed.2d 64 (1958), where barratry

> is one of the causes of the loss, if the ultimate cause (such as stranding or capture) is not excluded from coverage by a warranty or an exclusion clause, recovery may be had whether or not the ultimate cause of loss was or was not a peril insured against. . . . But where the ultimate cause of the loss is excluded from coverage by a warranty or an exclusion clause, recovery may not be had on the grounds of barratry.

151 F. Supp. at 231 (citations omitted) (emphasis added); see Nautilus Virgin Charters v. Edinburgh Insurance Co., 510 F. Supp. 1092, 1097 (D.Md. 1981) (quoting Republic of China), aff'd mem., 673 F.2d 1314 (4th Cir. 1981), cert. denied, 456

U.S. 945, 102 S.Ct. 2012, 72 L.Ed.2d 468 (1982). 8/

The instant insurance policy contains an express warranty by the Cavanaughs that the ship will not be navigated outside the 150-mile limit. It is clear that the barratry must be the efficient cause of

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8/ Lord Bramwell's statement in Cory is in accord:

> But then it is said than when barratry is the causa remota of the loss, it nevertheless may be relied upon without reference to the causa proxima. Now I will say nothing as to any general rule except to express a doubt as to whether what Lord Justice Brett said about that matter is perfectly correct. I have a misgiving about it; but I do not consider it necessary to determine anything of that sort here. It is possible that in some cases, where there has been barratry and a consequent loss within the perils insured against, you might call that a loss by barratry. In my opinion you cannot do so in this case. Call it an ultimate loss if you like, that ultimate loss was caused by a seizure, and that was warranted against.

loss to sustain recovery because if the grounding caused the loss, under the rule I have just stated, "the ultimate cause [would be] excluded from coverage by a warranty . . . ." Republic of China, 151 F. Supp. at 231. The district court apparently disagreed, and attempted to distinguish Nautilus Virgin Charters and Blaine Richards on the grounds that, in those cases, the proximate cause of the loss was a seizure, which was specifically excluded from coverage under a standard free of capture and seizure. (f.c.& s.) clause. See 635 F.2d at 1055; 510 F.Supp. at 1097. Cases in which barratry is followed by seizure by a foreign power or the equivalent are certainly more common than cases such as this one. See, e.g., John Cory & Sons v. Burr, [1883] A.C. 393; Ope Shipping, Ltd. v. Allstate Insurance Co., 521 F. Supp. 342 (S.D.N.Y. 1981);

aff'd in part, rev'd in part, 687 F.2d 639 (2d Cir. 1982), cert. denied, ___ U.S. ___, 103 S.Ct. 1523, 75 L.Ed. 2d 946 (1983); Flota Merchants Dominica v. American Manufacturers Mutual Insurance Co., 312 F. Supp. 58 (S.D.N.Y. 1970). Indeed, I have located only one case dealing with a territorial limitation on coverage; and, in that case, the court did not reach the issue but disposed of the case relying on an f.c.& s. clause. See Nautilus Virgin Charters, 510 F. Supp. at 1094 & 1100 n. 4. I nevertheless perceive no distinction between a loss not covered by virtue of an f.c.& s. warranty (or thereby expressly excluded) and a loss not covered by a territorial warranty. Therefore, unless Ballard's barratry was the efficient cause of the loss, the Cavanaughs may not recover.

In concluding that barratry proximately caused the loss of the ship, the district court relied on Darien Bank v. Travelers Indemnity Co., 654 F.2d 1015 (5th Cir. Unit B 1981) and Fishing Fleet, Inc. v. Trident Insurance Co., 598 F.2d (5th Cir. 1979). (See quoted excerpt supra.) The Cavanaughs staunchly support this reliance in their brief; however, I do not find these cases to be controlling. In Darien Bank, we held the evidence sufficient to support a finding of barratry, see Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969) (en banc), without addressing the precise issue presented here. In Fishing Fleet, barratry caused (in a general sense) the loss of the ship, but the Mexican government later seized the wrecked ship. 598 F.2d at 927. The insurance company denied coverage under the standard f.c.& s. clause; however, we

noted that the "total constructive loss" occurred before the seizure and held against the insurer. Id. at 929. The Fishing Fleet case is not dispositive because the barratry here (assuming that Ballard's exceeding the 150-mile limit constituted barratry) did not result in the loss under the efficient cause standard: when Ballard sailed outside the limit, the ship remained whole and sound.

In this case, it is clear beyond doubt that the efficient cause of the ship's loss was grounding on the Bajo Nuevo reef. An examination of the efficient cause analysis employed in two of the cases cited above that deal with f.c.& s. clauses illustrates and supports this conclusion. In Nautilus Virgin Charters, the captain committed barratry by using the vessel to smuggle marijuana; during the course of the smuggling voyage,

the Columbian government seized the vessel. The court held that the seizure, not the barratry, proximately and efficiently caused the loss. 510 F. Supp. at 1100; see also Cory, [1883] A.C. 393 (reaching same result on remarkably similar facts). The analysis here is identical. Arguably, neither the vessel in this case nor the vessel in Nautilus Virgin Charters would have been lost or seized had the barratry not occurred. It is nevertheless clear that barratry did not proximately cause the loss in either case, but that the cause of the loss was a peril excluded or warranted against.

The Cavanaughs contend in their brief and the majority holds that, because the policy here expressly covers grounding, U.S. Fire remains liable. This is not the proper analysis. The grounding occurred outside the 150-mile limit of coverage and

so was not covered. The Cavanaughs contend that Ballard's barratry renders the 150-mile limit without effect; however, this cannot be the correct result. When barratry breached the warranty, the insurance coverage, not the vessel, was lost. See supra discussion of Wilburn Boat Co.; see also Robinson v. Home Insurance Co., 73 F.2d 3 (5th Cir. 1934) (breach of warranty voids coverage), cert. denied, 294 U.S. 712, 55 S.Ct. 508, 79 L.Ed. 1246 (1935). 9/ The Cavanaughs could recover

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9/ The Robinson court stated:

> A warranty as to the place where the policy stipulates the insured vessel is to be located during the period covered by the policy makes the right of the insured to recover for damages or loss dependent upon the vessel being at the stated place when the damage or loss occurred; and if damage or loss occurs when the vessel is at a place other than the one named in the policy, the insured has no right to recover on the policy, though that place is quite as safe as the one named in the policy.

73 F.2d at 4.

had barratry caused the loss of the ship, but the policy provided no coverage for the loss of coverage. Indeed, it seems to me that the language quoted by the majority opinion (in note 2) supports only this conclusion in stating that "where the ultimate cause of the loss is excluded from coverage by a warranty or an exclusion clause, recovery may not be had on grounds of barratry." Republic of China, 151 F. Supp. at 271 (emphasis added). Here, the insured warranted that the vessel would not be outside the 150-mile limit. This provision-- a warranty-- voids coverage upon its breach no matter what the cause of the breach. See Arnould's ¶ 687 ("[e]ven the direct and irresistible operation of a peril expressly insured against in the policy is no excuse for noncompliance") ¶ 692 (citing

cases). 10/ The majority's attempted distinction of this rule on the basis that the insured in this case did not breach the warranty by a voluntary act is without merit. We are dealing here not with a tort but with a contract. Contracts law, from time immemorial, has predicated recovery on a strict liability theory. See id. Thus, it does not matter that it was arguably not the "fault" of the Cavanaughs that Ballard's actions breached the warranty.

The distinction between loss of ship and loss of coverage underlies and explains the earlier analysis of the law of efficient cause in barratry cases and

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10/ The majority cites no cases to support their holding that "barratry cannot operate to breach the warranty"; and, as Arnould's treatise demonstrates, the majority's position is without support. See also Republic of China, 151 F. Supp. at 231.

its application when the loss is either excluded or subject to a warranty. If barratry extended coverage in either case, the result would be insurance against perils not contemplated by the insurance company in issuing its policy. Anything and any voyage would be covered. I have little doubt that Lords Bramwell and Blackburn were mindful of this problem when they stated in the Cory case that they doubted the validity of a rule allowing recovery for remote causes in all barratry cases. See supra notes 3 & 4 (quoting Blackburn & Bramwell). 11/

I would hold that this district court's findings are without support in

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11/ As Arnould's treatise observes, the broad effect of the exception (which is an exception to an exception, in reality) in most cases will simply result in the general rule of efficient cause being applied. Arnould's ¶ 765.

the record or induced by an erroneous view of the law. See Noritake Co. v. M/V Helenic Champion, 627 F.2d 724, 727 (5th Cir. 1980); China Union Lines, Ltd. v. A.O. Anderson & Co., 364 F.2d 769, 795 (5th Cir. 1966), cert. denied, 386 U.S. 933, 87 S.Ct. 955, 17 L.Ed.2d 805 (1967).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 82-2182-Civ-SMA

UNITED STATES FIRE INSURANCE COMPANY,	)	
Plaintiff/ Counterdefendant	)	
vs.	)	FINAL JUDGMENT
GENE L. and CATHY CAVANAUGH,	)	
Defendants/Counter-Plaintiffs.	)	

THIS CAUSE having come before the Court for a non-jury trial, and the Court having under even date herewith entered its Findings of Fact and Conclusions of Law, in accordance therewith, it is

ORDERED AND ADJUDGED that the claim of Plaintiff/Counterdefendant UNITED STATES FIRE INSURANCE COMPANY for declaratory relief is DENIED, and the Plaintiff/Counterdefendant shall go hence without

day and take nothing on its claim for declaratory relief set forth in the Complaint. On the Counterclaim filed by the Defendant/Counter-plaintiffs GENE L. and CATHY CAVANAUGH, the Court hereby enters Judgment in favor of the Defendants/ Counterplaintiffs GENE L. and CATHY CAVANAUGH, and against the Plaintiff/ Counterdefendant UNITED STATES FIRE INSURANCE COMPANY, and GENE L. and CATHY CAVANAUGH shall recover of and from UNITED STATES FIRE INSURANCE COMPANY the sum of ONE HUNDRED SIX THOUSAND ONE-HUNDRED AND SEVENTY-FIVE DOLLARS AND SIXTY-SIX CENTS ($106,175.66), plus interest from June 14, 1981 until payment in full of this Judgment at the rate of twelve percent (12%), plus costs to be taxed by the clerk of

this court upon submission of a Bill of Costs form.*

ENTERED at Miami, Southern District of Florida, this 23 day of August, 1982.

UNITED STATES DISTRICT JUDGE

*The Court hereby reserves jurisdiction to consider award of attorney's fees to the Defendants/Counterplaintiffs is authorized, and if so, the amount thereof. lf such attorney's fees are sought, Defendant/Counterplaintiff shall submit a motion fully supported by legal authority establishing the basis and authority for such an award, as well as two (2) affidavits of attorneys experienced in the field of admiralty law and counsel's own affidavit to establish the reasonable amount of such award. Within ten (10) days from service thereof upon the Plaintiff/Counterdefendant, the Plaintiff/Counterdefendant shall file a response and counteraffidavits, if the award of attorney's fees is opposed. Unless either party specifically requests an evidentiary hearing, the Court shall make a determination based upon the foregoing submissions to the Court.

Copies furnished to: Christian D. Keedy, Esq.
William Cassidy, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 81-2182-Civ-SMA

UNITED STATES FIRE INSURANCE COMPANY,	)
Plaintiff/Counter-defendant,	)
vs.	)
GENE L. and CATHY CAVANAUGH,	)
Defendants/Counter-plaintiffs.	)

FINDINGS OF FACT
AND CONCLUSIONS OF LAW

THIS CAUSE having come before the Court for trial, and the Court having considered the testimony of all witnesses, both those testifying live in the courtroom and those whose testimony was presented by deposition, having considered the exhibits received in evidence and having heard the argument of counsel, the Court hereby enters its Findings of

Fact and Conclusions of Law as follows, pursuant to Rule 52, Fed.R.Civ.P.

FINDINGS OF FACT

1. This is an action for declaratory judgment brought by Plaintiff UNITED STATES FIRE INSURANCE COMPANY on a contract of marine insurance. The Defendants, GENE L. and CATHY CAVANAUGH, have filed a counterclaim for payment under the same policy.

2. UNITED STATES FIRE INSURANCE COMPANY is a corporation authorized to do business in the State of Florida and is incorporated in the State of New York.

3. GENE L. and CATHY CAVANAUGH are residents and citizens of the State of Florida

4. The insurance policy introduced into evidence as Plaintiff's Exhibit No. 4 was issued by UNITED STATES FIRE INSURANCE COMPANY to provide coverage from

May 23, 1981 to May 23, 1982, for the 1977 - 73' Shrimp Trawler SERIOUS BUSINESS, built by St. Augustine Trawlers.

5. GENE L. and CATHY CAVANAUGH are the insureds under the policy referred to above.

6. A settlement has been reached between Atlas Underwriters, Ltd., mortgagee of the vessel SERIOUS BUSINESS, and the Plaintiff, UNITED STATES FIRE INSURANCE COMPANY, and no claim herein is made under the American Institute Single Interest Mortgagee policy attached to Policy H 9648

7. Lennis A. and Louis B. Cavanaugh purchased the SERIOUS BUSINESS in May of 1979.

8. In August of 1980, Lennis A. and Louis B. Cavanaugh sold the Shrimp Trawler SERIOUS BUSINESS to GENE LEE CAVANAUGH and his wife, CATHY B. CAVANAUGH, and a mort-

gage was placed on that vessel by GENE LEE and CATHY B. CAVANAUGH in the amount of $100,000 in favor of Atlas Underwriters, Ltd.

9. GENE L. CAVANAUGH, who is Lennis A. Cavanaugh's son, was the captain or master of the Shrimp Trawler SERIOUS BUSINESS from August of 1980 until the last voyage.

10. After the Atlas Underwriters' mortgage was placed on the SERIOUS BUSINESS, a second mortgage in the amount of $120,000 was placed on that vessel by GENE LEE and CATHY B. CAVANAUGH in favor of Lennis A. and Louis B. Cavanaugh.

11. At no time was UNITED STATES FIRE INSURANCE COMPANY told that William C. Ballard was to be a paid captain of the Shrimp Trawler SERIOUS BUSINESS.

12. On May 13, 1981, GENE LEE CAVANAUGH entered into an agreement with

Captain Ballard, a copy of which was introduced into evidence as Plaintiff's Exhibit No. 16. Therein, Captain Ballard agreed to take the SERIOUS BUSINESS shrimping in the area from St. Augustine, Florida to Brownsville, Texas. Captain Ballard also agreed to maintain the vessel and all of its mechanical parts.

13. GENE CAVANAUGH told Captain Ballard that his insurance would only cover the vessel when it was used from Cape Hatteras, North Carolina, to Brownsville, Texas, and not farther than 150 miles offshore.

14. The Shrimp Trawler SERIOUS BUSINESS left Marathon, Florida, on or about May 15, 1981, with William C. Ballard aboard as captain and Munce Millis and Jimmy Ingram aboard as deck hands. Millis and Ingram had previously been crew members on the SERIOUS BUSINESS for a period

of one to one and one-half years prior thereto. The trip that commenced on or about May 15, 1981, was the first trip the vessel made under the ownership of GENE CAVANAUGH without GENE CAVANAUGH as the captain.

15. At or about 0400 or 0500 on June 14, 1981, the Coast Guard called the CAVANAUGHS, and advised that the SERIOUS BUSINESS was hard aground and breaking up approximately 160 miles southwest of Jamaica with eight people aboard, including Ballard, Millis and Ingram

16. The next morning, June 15, 1981, GENE CAVANAUGH was called by the insurance agent, Carey Brickell, who said he had heard a radio broadcast in Jacksonville indicating that the vessel had stranded, and GENE CAVANAUGH confirmed that he had heard a similar report from the Coast Guard.

17. On June 15, 1981, a United States Coast Guard helicopter, piloted by Lt. Kevin Marshall, located the remains of the Shrimp Trawler SERIOUS BUSINESS on the Bajo Nuevo Reef at Latitude 15-53.41 degrees North, and Longitude 78-33.1 degrees West.

18. At the time Lt. Marshall located the SERIOUS BUSINESS, it was aground on a reef, and the deckhouse or superstructure had been on fire and was still smoldering.

19. Lt. Marshall and his helicopter rescued eight people from knee-deep water near the SERIOUS BUSINESS. These people included William C. Ballard, Jimmy Ingram and Munce Millis. The CAVANAUGHS were without knowledge as to why the vessel was in the area of the Bajo Nuevo Reef, and they did not authorize or consent to the operation of the vessel there. There is no evidence to suggest that the CAVANAUGHS

authorized, agreed to, or were in any way involved with Ballard's decision to operate the vessel at the location where it grounded.

20. Bajo Nuevo Reef is not within the U.S. Coastal and inland tributary waters from Cape Hatteras, North Carolina, to Brownsville, Texas, both inclusive, but not to exceed 150 miles offshore therefrom.

21. In December of 1981, the full premium in the amount of $6,751.00 was mailed to GENE and CATHY CAVANAUGH by UNITED STATES FIRE INSURANCE COMPANY through the agent, Bayly, Martin & Fay.

22. The tender of this return of premium was refused by the CAVANAUGHS in February of 1982 by and on behalf of the CAVANAUGHS.

23. By the terms of the policy involved here, it is agreed between the

Plaintiff and Defendants that the value of the Shrimp Trawler SERIOUS BUSINESS, for the purpose of this insurance, was $180,000.

24. UNITED STATES FIRE INSURANCE COMPANY, on March 15, 1982, paid Atlas Underwriters, Ltd. $73,824.34, and by that payment, satisfied the first mortgage on the Shrimp Trawler SERIOUS BUSINESS and the individual obligations of GENE and CATHY CAVANAUGH on the Promissory Note for which that mortgage constitutes security.

25. The principal due on the mortgage of the SERIOUS BUSINESS at the time of its loss was $67,959.35, and interest accrued on that balance at the daily rate of $18.619.

26. Prior to hiring Captain Ballard, GENE CAVANAUGH had knowledge of Ballard's reputation as a captain through radio conversations he had heard and engaged in

with other vessel operators, as well as through consultations with other vessel owners and operators. Captain Ballard's reputation among these vessel owners and operators was that he generally produced a good catch and that he took care of the owner's equipment. Prior to allowing Captain Ballard to depart from Marathon, Florida on May 15, 1981, as captain of the vessel, GENE CAVANAUGH accompanied Ballard on a four (4) to five (5) hour test run, for the purpose of observing and evaluating Ballard's ability to captain the vessel. During this test run Ballard was required to pilot the vessel through a narrow channel with many reefs. GENE CAVANAUGH was satisfied that Captain Ballard had piloted the vessel successfully and skillfully, and CAVANAUGH was satisfied that Ballard was competent to captain the vessel. In the foregoing

manner, GENE CAVANAUGH exercised due diligence and care to assure that Ballard was competent to captain the vessel and that the vessel was thus seaworthy when it departed.

27. Hiring Captain Ballard on a one-trip basis for a single fishing expedition did not violate the change of management and/or bareboat chartering clause of the insurance policy. Testimony by expert witnesses for both parties supports this conclusion. The practice of hiring a paid captain is common in the industry, and such practice does not constitute a change of management or bareboat chartering under the policy.

28. The facts adduced at trial affirmatively establish barratry by Captain Ballard in deliberately and willfully disobeying GENE CAVANAUGH'S oral instructions regarding the effective territorial

limits of the insurance policy on the vessel, and in deliberately and willfully breaching the written agreement with GENE CAVANAUGH to operate the vessel in the area from St. Augustine, Florida to Brownsville, Texas.

29. The proximate cause of the loss of the vessel was the barratry of Captain Ballard, which resulted in the grounding, fire and destruction of the vessel.

30. The Plaintiff/Counterdefendant contends that there were material misrepresentations and/or breach of warranties by GENE L. and CATHY CAVANAUGH in connection with renewal of the insurance policy, regarding the operation and/or management of the vessel, and that these alleged misrepresentations and/or breach of warranties affected the risk assumed by the Plaintiff/Counterdefendant under the policy. The Court finds that the Plain-

tiff/Counterdefendant has failed to sustain its burden of establishing such material misrepresentations and/or breach of warranties by a preponderance of the evidence.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the subject matter of this litigation pursuant to 28 U.S.C. sec. 1333. The Court has jurisdiction over the parties to this action.

2. The nature of the Plaintiff's cause of action against the Defendants is for declaratory relief under its marine policy of insurance and the nature of the Defendants/Counterplaintiffs' cause of action against the Plaintiff/Counterdefendant is for breach of contract with regard to the same marine policy of insurance.

3. The marine policy of insurance issued by U.S. FIRE contained the follow-

ing paragraph which is headed "CHANGE OF INTEREST":

> In the event of any change, voluntary or otherwise, in the ownership of the Vessel or if the Vessel be placed under new management or be chartered on a bareboat basis or requisitioned on that basis, then, unless the Underwriters agree thereto in writing, this Policy shall thereupon become cancelled....

4. The Court finds as a matter of law that the hiring of Captain Ballard as a paid captain did not rise to a "change of interest" from the insured, GENE L. and CATHY CAVANAUGH, to Captain Ballard. The expert testimony adduced at trial established that the practice of hiring a paid captain is a common practice in the fishing industry, and such a practice on a temporary, one-trip basis does not constitute a change of management or interest, or bareboat chartering, as those terms are defined and applied in the industry.

5. The subject policy of insurance contained the following endorsement: "Warranted navigation confined to U.S. coastal and inland tributary waters from Cape Hatteras, N.C., to Brownsville, Texas, both inclusive, but not to exceed 150 miles offshore therefrom." The Plaintiff/Counterdefendant contends that because the vessel was lost outside the navigational limits as described in its policy of insurance, the coverage under the policy no longer applied. In addition, the Plaintiff/Counterdefendant contends that the proximate cause of the loss was the grounding of the fishing vessel outside the territorial limits of the policy coverage, and therefore such grounding was not covered by the insurance policy. The Court concludes that the Defendants/Counterplaintiffs are entitled to judgment because the proximate cause of the loss

was the barratry of the master of the vessel, a covered loss under the policy. (See, "Perils" clause of policy, Plaintiff's Ex. No. 4).

6. Barratry of the master is defined as "an act committed by the master or mariners of a ship for some unlawful or fraudulent purpose, contrary to their duty to the owners, whereby the latter sustain an injury." Darien Bank v. Travelers Indemnity Co., 654 F.2d 1015, 1019 (5th Cir. 1981); Fishing Fleet, Inc. v. Trident Insurance Co. 598 F.2d 925, 927 (5th Cir. 1979). As the Court in Fishing Fleet, Inc., supra, noted:

> Barratry is a generic term which includes many acts of various kinds and degrees. It comprehends any unlawful, fraudulent or dishonest act of the master or mariners, and every violation of duty by them arising from gross and culpable negligence contrary to their duty to the owner....

598 F.2d at 927, quoting National Union Fire Insurance Company v. Republic of China, 254 F.2d 177, 183 (4th Cir.), cert. denied, 358 U.S. 823 (1958). Simple negligence of the captain or crew does not constitute barratry, however. Fishing Fleet, Inc., supra, 598 F.2d at 928. In the case sub judice, the acts of Captain Ballard in deliberately and willfully disobeying GENE CAVANAUGH'S oral instructions regarding the effective territorial limits of the insurance policy on the vessel, and in deliberately and willfully breaching the written agreement with GENE CAVANAUGH to operate the vessel within the territorial limits prescribed therein, establish barratry by Captain Ballard.

8. Captain Ballard's barratry was the proximate cause of the loss of the vessel. See Darien Bank, supra, 654 F.2d at 1019-22; Fishing Fleet, Inc., supra,

598 F.2d at 927-28. His deliberate and willful misconduct directly caused the grounding, fire and destruction of the vessel. The cases cited by the Plaintiff/ Counterdefendant for a contrary proposition are inapposite. Those cases, Blaine Richards & Co. v. Marine Indemnity Insurance Company of America, 635 F.2d 1051 (2d Cir. 1980) and Nautilus Virgin Charter, Inc. v. Edinburgh Insurance Co., 510 F.Supp. 1092 (D. Md. 1981), aff'd without published opinion, 673 F.2d 1314 (4th Cir. 1981), involved detention or seizure of vessels, where the insurance policy specifically excluded such detention or seizure from coverage under the Free from Capture and Seizure ("F.C.& S.") Clause. The case sub judice involves no detention or seizure of the vessel such that a specific exclusion from coverage applies. The vessel was outside the territorial

limits of the policy as a result of the barratry of the master, which is a covered loss under the "Perils" clause of the policy. Moreover, the Court notes the following language from the Blaine & Richards Co. case:

> At the same time, the single cause nearest to the loss in time should not necessarily be found to be the proximate cause. [Citation omitted.] Instead, in accord with the reasonable understandings and expectations of the parties, we must attempt to ascertain what the Supreme Court has referred to as the "predominant and determining" or the "real efficient" cause of the loss. [Citations omitted.] Determination of proximate cause in these cases is thus a matter of applying common sense and reasonable judgment as to the source of the losses alleged.

635 F.2d at 1054-55.

9. Despite allegations by the Plaintiff/Counterdefendant that there were material misrepresentations and/or breach of warranties regarding the hiring of Captain Ballard and the exercise of due

diligence in keeping the vessel seaworthy by the insureds such as to preclude payment under the insurance policy, the Court has found that there were no such misrepresentations or breach of warranties. Accordingly, payment under the policy is not precluded on this ground.

10. Pursuant to the American Institute Single Interest Mortgagee policy attached as Endorsement Number One (1) to the insurance policy issued by UNITED STATES FIRE INSURANCE COMPANY on the vessel SERIOUS BUSINESS, UNITED STATES FIRE INSURANCE COMPANY previously paid to Atlas Underwriters, Inc., mortgagee of the vessel SERIOUS BUSINESS, the sum of $73,824.34. Plaintiff's Exhibit No. 24. Endorsement Number One (1) to the insurance policy on the SERIOUS BUSINESS includes the following provision:

> This Policy insures only against the non-payment by underwriters of the Hull Policy, of a claim asserted thereunder for any liability, loss, damage or expense occurring or arising during the term of this Policy, which non-payment results from any act of, or omission by, the assured(s) named in the Hull Policy, or breach of any warranty, express or implied, in the Hull Policy other than breach of the warranty contained in the F.C.&S. Clause thereof . . . .

Accordingly, the coverage provided in the policy attached as Endorsement Number One (1) to Policy H 9648 is payable only when a loss is not payable under the main policy covering the vessel. Endorsement No. 1 does not provide additional coverage when a loss is payable under the main policy. Because the Court finds the loss of the SERIOUS BUSINESS covered by and payable under terms of the main policy, the sum of $73,824.34, previously paid by UNITED STATES FIRE INSURANCE COMPANY to Atlas Underwriters, Inc. shall be deducted

from the amount payable under the main policy. The parties have agreed that by the terms of the policy involved here, the value of the vessel SERIOUS BUSINESS for the purpose of the insurance coverage involved herein was $180,000. Pretrial Stipulation, Stipulated Fact No. 23, docket entry No. 45. Accordingly, the Court finds that the amount payable to the Defendants/Counterplaintiffs under the policy of insurance on the SERIOUS BUSINESS is $106,175.66.

11. Absent peculiar circumstances, prejudgment interest from the date of loss is generally awarded in admiralty cases. Noritake Co. v. M/V Hellenic Champion, 627 F.2d 724, 728 (5th Cir. 1980); Sabine Towing & Transportation Co. v. Zapata Ugland Drilling, Inc., 553 F.2d 489, 490-91 (5th Cir.), cert. denied, 434 U.S. 855 (1977). The rate of interest is a matter for the

trial court's discretion, and the court may look to state law as a guidepost. Gator Marine Service Towing, Inc. v. J. Ray McDermott & Co., 651 F.2d 1096, 1101 (5th Cir. 1981); Sabine Towing, supra, 553 F.2d at 491. The Court finds no peculiar circumstances that would bar an award of prejudgment interest in this case. Accordingly, the Defendants/Counterplaintiffs are entitled to prejudgment interest from June 14, 1981, at the rate of twelve percent (12%).

12. Pursuant to these Findings of Fact and Conclusions of Law, the Court shall, under even date herewith, enter Final Judgment against the Plaintiff/Counterdefendant and in favor of the Defendants/Counterplaintiffs in the amount of $106,175.66.

ENTERED in Chambers at Miami, Southern District of Florida, this 23 day of August, 1982.

UNITED STATES
DISTRICT JUDGE

Copies furnished to:
Christian D. Keedy, Esq.
William Cassidy, Esq.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 82-6064

UNITED STATES FIRE INSURANCE COMPANY,	)
Plaintiff/Counter-defendant-Appellant,	)
vs.	)
GENE L. and CATHY CAVANAUGH,	)
Defendants/Counter-plaintiffs-Appellees.	)

Appeal from the United States District Court for the Southern District of Florida

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion May 17, 11 Cir., 1984 __F.2d__).

(Jul. 10, 1984)

Before HILL and HATCHETT, Circuit Judges and ALLGOOD*, District Judge.

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* Honorable Clarence W. Allgood, U.S. District Judge from the Northern District of Alabama, sitting by designation.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

(___) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

(___) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the jduges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT

_____
United States Circuit Judge

July 11, 1984

TO ALL PARTIES BELOW:

NO. 82-6064 - U.S. FIRE INSURANCE -v-
GENE L. CAVANAUGH

This is to advise that an order has this day been entered denying the petition ( ) for rehearing.

___ The Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure: Circuit Rule 26), the Petition ( ) for rehearing en banc has also been denied.

XX No member of the panel nor Judge in regular active service on the

Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure: Eleventh Circuit Rule 26), the petition ( ) for rehearing en banc has also been denied.

See Rule 41, F.R.A.P., and Eleventh Circuit Rule 27 for issuance and stay of the mandate.

Very truly yours,

SPENCER D. MERCER, Clerk

By JOYCE J. LARKIN
Deputy Clerk

cc: Mr. Christian D. Keedy
Mr. John D. Kallen

ENDORSEMENT no. 1

ASSURED: LENNIS A. CAVANAUGH

FISHING VESSEL
SPECIAL TERMS AND CONDITIONS

In consideration of the premium charged and effective May 23, 1980, the following amendments shall be made part of this policy:

1. Warranted the insured vessel shall be engaged in shrimping.

2. Warranted that the vessel be operated in accordance with United States law and the law of the port of registry.

3. Warranted navigation confined to U.S. coastal and inland tributary waters from Cape Hatteras, N.C. to Brownsville, Tex, both inclusive, but not to exceed 150 miles offshore therefrom.

4. SPECIAL EXCLUSIONS:

A. This insurance shall not cover loss of, damage to, or expense in connection with fishing or trawling equipment (e.g. tackle, apparel, winches, masts, booms, mast and boom rigging and their appurtenances) occurring while such equipment is actually being used in fishing or trawling operations and/or operations incidental thereto, unless the Assured shall establish that such loss, damage or expense was caused solely by fire, lightning, or explosion, or caused by the vessel herself stranding, sinking due to a peril insured against or in collision with any object other than water.

B. This insurance shall not cover charges, damages or loss in

consequence of seizure or detention for or on account of any illicit or prohibited trade nor for entering nor for the consequence of entering prohibited fishing waters nor for violations of any port regulation nor for any claims for wages or provisions furnished to officers or crew while the property insured hereunder may be detained as the result of any such violation, seizure, detention, loss or disaster or during any subsequent salvage and/or repairs.

C. This insurance is warranted free from all claims of whatsoever nature in connection with cargo.

All other terms and conditions remain unchanged.

Attached to and forming part of Policy No. H-9051 of United States Fire Insurance Company

_____

Authorized Representative

FILED
OCT 31 1984
ALEXANDER L. STEVAS,
CLERK

CASE NO. 84-524

in the Supreme Court of the United States

UNITED STATES FIRE INSURANCE COMPANY,

Petitioner

vs.

GENE L. and CATHY CAVANAUGH,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOHN D. KALLEN of
HAYDEN AND MILLIKEN, P.A.
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Miami, Florida 33146
(305) 662-1523
Attorneys for Respondents

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12pp

QUESTION PRESENTED FOR REVIEW

Respondents, GENE AND CATHY CAVANAUGH, have restated the question presented for review by the Petitioner herein, so that it is in conformity with the factual findings of the District Court, as affirmed by the United States Court of Appeals for the Eleventh Circuit.

WHERE THE INSURED VESSEL GOES BEYOND THE WARRANTED NAVIGATIONAL LIMITS OF THE INSURANCE POLICY BY REASON OF THE BARRATRY OF THE MASTER, WHICH RESULTS IN A TOTAL LOSS DUE TO FIRE AND GROUNDING, IS THE LOSS COVERED BY THE POLICY WHICH INSURES AGAINST LOSS DUE TO BARRATRY, FIRE AND GROUNDING?

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OTHER AUTHORITIES	
28 U.S.C., Supreme Court Rules, Part V, Rule 17	1
Arnould's Law of Marine Insurance and Average, Sec. 692 (16th ed. 1981)	2

STATEMENT OF THE CASE

The *only* pertinent and material facts that are necessary for consideration are the following:

1. Petitioner's insurance policy provided insurance coverage for losses due to barratry, fire and grounding.

2. The policy provided that it was "warranted" that the vessel would be operated only within certain specified areas.

3. The vessel was outside the navigational limits at the time of the loss by reason of the barratry of the master.

4. The barratrous acts on the part of the master directly resulted in the grounding, fire and destruction of the insured vessel.

ARGUMENT IN OPPOSITION TO PETITION

Respondents would respectfully submit that there is no basis, indeed, no special or important reason for this Court to allow the Petition and accept jurisdiction over this case. The Eleventh Circuit's opinion that Petitioner seeks to have reviewed is not in conflict with another Federal Court of Appeal's decision and does not otherwise depart from the accepted and usual course of judicial proceedings. 28 U.S.C., Supreme Court Rules, Part V, Rule 17.

Petitioner contends that the Eleventh Circuit opinion is in conflict with *Wilburn Boat v. Fireman's Fund*

Insurance Co., 201 F.2d 833 (5th Cir. 1953), *rev'd on other grounds*, 348 U.S. 310, 75 S.Ct. 368, 99 L.Ed. 337 (1954), and, *Home Insurance Company v. Ciconett*, 179 F.2d 892 (6th Cir. 1950). Both of these cases involved a breach of an express warranty in the insurance policy. For that reason alone, it is clear that there can be no conflict with the Eleventh Circuit opinion here. Very simply, even assuming that the navigational limits (as stated in the policy) constituted a "warranty"[1], there was no breach. Both the District Court and the Eleventh Circuit found that the vessel, at the time of the loss, was beyond the navigational limits by reason of the barratry of the master, a peril specifically insured against by Petitioner's policy.

Barratry has been defined as constituting an act committed by the master for some unlawful or fraudulent purpose, contrary to his duties to the owner. *Darien Bank v. Travelers Indemnity Company*, 654 F.2d 1015, 1019 (5th Cir. 1981). The deliberate act of the master in causing the vessel to deviate from its proper or agreed upon course to the detriment of the owner falls within the scope of this definition. *Whorton v. Home Insurance Company*, 724 F.2d 427, 431 (4th Cir. 1984); *United States Fire Insurance Company v. Cavanaugh*, 732 F.2d 832 (11th Cir. 1984); *Nautilus Virgin Charters v. Edinburgh Insurance Company*, 510 F.Supp. 1092, 1095, (D.Md.

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[1]The policy provision stated as follows: "Warranted navigation confined to U.S. coastal and inland tributory waters from Cape Hatteras, N.C. to Brownsville, Texas, both inclusive, but not to exceed 150 miles offshore therefrom." Arnould considers such a provision to be an *exception* to coverage rather than a true promissory warranty. *Arnould's Law of Marine Insurance and Average*, Sec. 692 (16th ed. 1981).

1981), *aff'd mem.*, 673 F.2d 1314 (4th Cir. 1981), *cert. denied*, 456 U.S. 945, 102 S.Ct.2012, 72 L.Ed.2d 468 (1982). *See also, Ope Shipping Ltd. v. AllState Insurance Company*, 521 F.Supp.342 (S.D.N.Y. 1981), *aff'd in part, rev'd in part*, 687 F.2d 639 (2d Cir. 1982), *cert. denied*, 460 U.S.1069, 103 S.Ct. 1523, 75 L.Ed.2d 946 (1983).

In concluding that the barratry of the master (in this case) did not constitute a breach of the so-called navigational warranty, both courts were giving full force and effect to the terms and conditions of the Petitioner's policy. The result was not an extension—let alone an unjustified one—of the insurance coverage as the Petitioner would suggest. This is not a situation where the barratrous act of the master commenced *after* the vessel was beyond the navigational limits. Rather, it was *only* because the policy contained such a "warranty", that the deliberate act of the master (in taking the vessel beyond the agreed upon limits) was barratrous.[2] *Nautilus Virgin Charters, supra.*

If Petitioner had not intended to insure against barratry, or even the particular form or mode (as in this case), such an intention should have been expressed in the policy. It was not. Nor is it reasonable to suppose —as does Petitioner—that the navigational warranty negates barratry as a covered peril. It would produce

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[2]If there were no proscribed areas, there could not have been deviation, and thus no "unlawful or fraudulent" act detrimental to the owner. Clearly then, the barratry commenced while the vessel was still within the warranted limits. *See, Whorton, supra*, 724 F.2d at 430.

an absurd result which the parties could not have intended.[3]

The Eleventh Circuit found that the barratry was "connected to the ultimate cause of the loss (here, fire)", 732 F.2d at 835, n.2, a peril specifically insured against in Petitioner's policy. Clearly, once the vessel went beyond the navigational limits, the barratry did not suddenly cease. Rather, it continued until the vessel was ultimately destroyed by fire (and grounding).[4]

In sum, not only was the ultimate cause of the loss a peril (fire) insured against, but it was a consequence of or a direct result of another peril (barratry) insured against. Compare, those cases involving barratry where the losses were held not to be covered[5], either, because the ultimate cause of the loss was a peril specifically *excluded*, *Cory v. Burr*, [1883] A.C. 393 (seizure), *Nautilus Virgin Charters, supra* (seizure), *Flota Merchants Dominica v. American Manufacturers Mutual Insurance Co.*, 312 F.Supp.58 (S.D.N.Y. 1970) (war risks), *or*, because the ultimate cause of the loss was a direct result or consequence of a peril specifically *excluded*. *Republic of China v. National Union Fire Insurance Co.*, 151 F.

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[3]In effect, it would be tantamount to excising barratry as a peril insured against in Petitioner's policy.

[4]Indeed, the very concept of barratry requires an act contrary to the owner's interest which results in an injury (loss) to the owner. *Fishing Fleet, Inc. v. Trident Insurance Co., Ltd.*, 598 F.2d 925, 927 (5th Cir. 1979).

[5]Under marine risk policies identical to Petitioner's policy in this case.

Supp. 211 (D.Md. 1957), *aff'd*, 254 F.2d 177 (4th Cir.), *cert. denied*, 358 U.S. 823, 79 S.Ct. 38, 3 L.Ed.2d 64 (1958) (civil war), *Ope Shipping, Ltd, supra* (civil war).

Accordingly, if barratry is to have any meaning at all as a specified peril insured against, it is in a case such as this. The barratry neither occurred by reason of a peril excluded in Petitioner's policy (as in *Republic of China, supra*), nor produced or caused a loss by reason of a peril excluded in Petitioner's policy (as in *Nautilus Virgin Charters, supra*). As the Eleventh Circuit reasoned here:

> To hold otherwise would be to find that one covered peril could operate to relieve the insurer of any loss which occurred from another covered peril. 732 F.2d at 835.

Indeed, having agreed to undertake and insure against barratry, grounding and fire, Petitioner's policy must be enforced as written—*not as construed by Petitioner.* The Respondents would therefore respectfully submit that the Eleventh Circuit correctly affirmed the decision of the District Court finding Petitioner liable under the policy.

There being no basis to support a review of the Eleventh Circuit opinion, this Court, in the proper exercise of its discretion, should deny the Petition for Writ of Certiorari.

CONCLUSION

Based upon the foregoing argument and citations of authorities, it is respectfully submitted that the Petitioner has failed to sustain its burden in accordance with Rule 17, and accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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BY:
JOHN D. KALLEN
Attorneys for Respondents,
GENE AND CATHY
CAVANAUGH

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have, on this 29th day of October, 1984, served three copies of the foregoing Brief In Opposition to Petition for Writ of Certiorari to: Christian D. Keedy, Esquire, Counsel for Petitioner, 1301 Alfred I. duPont Building, Miami, Florida 33131.

JOHN D. KALLEN